# No. 12,680

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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UNITED STATES OF AMERICA,
*Appellant,*

vs.

A. LESTER MARKS, ELIZABETH LOY MARKS, and HERBERT M. RICHARDS, Trustees of the Estate of L. L. McCandless, Deceased,
*Appellees.*

**Upon Appeal from the United States District Court for the Territory of Hawaii.**

## REPLY BRIEF FOR THE UNITED STATES, APPELLANT.

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### I.

**THE DAMAGES TO THE PERSONAL PROPERTY AROSE OUT OF THE COMBAT ACTIVITIES OF MILITARY PERSONNEL OF THE UNITED STATES.**

Seemingly, appellees acquiesce in the Statement of the Government's brief. In consequence, they do not controvert its assertion (Br. 13) that "there was no dispute as to the time, physical nature, and purpose of the activities causing the damage" and hence that

this appeal involves "only the construction of the term 'combat activities'." However, they rely upon the report of the subcommittee favorably reporting the bill which became the jurisdictional Act. And, without disputing the Government's charge (Br. 16-17) that the report confused the military activities which occurring immediately after Pearl Harbor caused the damages with other activities which took place months after, they contend (Br. 6, et seq.) the report is to be taken as establishing that the activities causing the damage were noncombatant in character. Of course, this is not so.

Whether or not representatives of the Army should have appeared before the subcommittee, the fact remains they did not appear and accordingly the subcommittee heard but one side of the case. As has been pointed out, it confused the facts. In addition, it thought that appellees had been damaged in the sum of $113,655 and it favored legislation *giving* them this amount. Yet, in this suit brought under the jurisdictional Act substituted at the urging of the Department of Defense, appellees could only establish damages of $65,894 or $58,760 less than the subcommittee thought had been sustained. It is apparent, therefore, that the views of the subcommittee—derived as they were from the allegations of appellees—cannot be taken as foreclosing any issue of fact in this suit.

In its opening brief the Government showed that the activities which caused the damage to personal property occurred on and within ten days after the

attack on Pearl Harbor,[1] that the activities were emergency measures to repel an expected renewal of the attack and that the area was a combat zone. Clearly then they were "combat activities" as the term was used in the jurisdictional Act. Appellees' suggestion (Br. 8) that such activities only occur "in combat" would make the term meaningless. Thus, when the Defense Department suggested the proviso, it—and everyone else—knew that the damages had not been sustained in battle with the Japanese. Certainly then the proviso was inserted to exempt the Government from liability for *other* activities of its soldiers. Furthermore, since it would be virtually impossible to determine by which side damages sustained "in combat" were caused, there would be no need to exempt the United States from liability for damages sustained in combat. Therefore, unless the term covers activities closely connected with combat—like those here involved—it has no meaning or effect.

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## II.

### THE LEASES WERE LAWFULLY CANCELED.

**A. The withdrawal was authorized by the Organic Act.**

So far as material, section 91 of the Organic Act provides:

> *Except as otherwise provided,* the public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolu-

[1]The first paragraph of appellees' statement (Br. 2) recites this fact.

> tion of annexation * * * shall remain in the possession, use and control of the government of the Territory * * * and shall be maintained, managed and cared for by it, at its own expense, until * * * taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii. (Emphasis added.)

And at pages 18-21 of its opening brief, the Government pointed out that the lands here involved—ceded by the joint resolution of annexation—were taken for the use of the Army for war purposes and consequently appellees were not entitled to be compensated for loss of the leases granted them by the Territory. Or, as it was put at page 19: "As section 91 makes plain, the Territory possessed the lands at the will of the United States [and] could not of course grant the appellees any more than it had."

In effect—as the Government understands their position—appellees contend (Br. 10-18) that the four words at the beginning of section 91, emphasized above, removed the lands in question from the operation of that section, subjected them to the terms of section 73 of the Act, and—so appellees argue—consequently abrogated the power of the United States acting either through the President or the Governor validly to resume possession of the lands for national purposes.

At each step, the argument bogs down. Thus, if because of "except as otherwise provided", section 91 no longer governed these lands, then they also ceased to be "in the possession, use, and control of the gov-

ernment of the territory'' (for that provision precedes the one giving the President and Governor the power to withdraw) and reverted to the United States. Section 73(q), 48 U.S.C. sec. 677, gives to the commissioner authority to manage "All lands in the possession, use, and control of the Territory'' i.e., the lands referred to in section 91. In the second place, there is nothing in section 73 that even hints that leased lands may not be withdrawn pursuant to section 91.

Appellees observe—correctly—that the United States could not withdraw the lands if the Territory had *sold* them. (Br. 11, 12.) But lands sold by the Territory are no longer public lands. Thus in section 73(c), 48 U.S.C. sec. 664, Congress has indicated that land patents would be issued by the territorial government and in subsections (j), (k), and (l), 48 U.S.C. secs. 671-673, has authorized the sale of public lands to settlers, religious organizations and individuals for residential and business purposes. Subsections (f) and (g), 48 U.S.C. secs. 667 and 668, recognize that land patents or homestead leases will be issued after the conditions of various homestead agreements are met. The United States cannot take these patented lands without making compensation therefor because with the approval of Congress the lands have been transferred to individuals in fee and have lost their status as public lands, so that nothing is left upon which the right of the United States reserved in section 91 could operate. On the other hand, there is no indication in section 73 or in any other statute, federal or territorial, that lands under a general lease would

lose their status as public lands thereby. Such lands remain public lands and are subject to the exercise of the right reserved by the United States in section 91.[2]

In the light of the foregoing, appellees' further argument (Br. 13-15), that the provisions of the lease granted by the Territory govern, is irrelevant and the decision in *Ai v. Bailey,* 30 Haw. 210 (1930) is immaterial. Moreover, that case supports the Government's position. For in holding that the power to withdraw "for any public purpose" did not permit the Territory to cancel the lease so that it could convey the land to a private corporation and receive in return other land, the Court said (pp. 210-211): "Read, however, in connection with the remaining language of the lease under consideration, we think that the requirements of English, common sense and common experience do not permit of this construction, but *indicate on the contrary that the expression was used as meaning that the lands to be withdrawn were to be themselves devoted to a public use* and were not to be given away in exchange for other lands which in turn would be devoted to the public use. The doctrine *noscitur a sociis* applies." (Emphasis added.) In other words, since the lands leased to appellees were

[2]This is recognized in the provision of section 73(j), 48 U.S.C. sec. 671, enacted long before 1941, authorizing transfer to other lands of a preference right to purchase frustrated because "such parcel of public lands is reserved for public purposes, either for the use of the United States or the Territory of Hawaii".

to be devoted to the use of the Army, their withdrawal was expressly authorized by the lease provisions.[3]

**B. The leases themselves provided for cancellation if the lands were neded by the United States.**

Apart from its invocation of *Ai v. Bailey,* appellees do not answer the Government's contention under this head. Since the *Bailey* case sustains the Government's position it is abundantly plain that for the reasons given in the opening brief the terms of the leases authorized their cancellation when the lands were needed by the Army.

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## III.

### THE TRIAL COURT ERRED IN DENYING THE GOVERNMENT'S CLAIM FOR SET-OFF.

Appellees make no answer to the Government's argument that the trial Court erred in denying its claim for set-off on the grounds that it was irrelevant to the subject matter and had not been established by a preponderance of the evidence. Instead they assert (Br. 19-21) that no evidence was introduced to show that the parties contemplated the work should be paid for and suggest that the Army intended to confer a gratuity. But it is obvious that none of the representa-

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[3]As was pointed out in the Government's opening brief (pp. 19-21) the amendment of section 73(q) by the Act of August 21, 1941, extended the withdrawal power to lands acquired by the Territory since annexation. Appellees' quotation from the legislative history of the amendment (p. 18) confirms this and the point of its discussion of the effect of the amendment (pp. 15-18) is not apparent to the Government.

tives of the Government was authorized to make gifts of public money or other property to appellees. Such extraordinary power clearly would have to be expressly conferred by statute (cf. *District of Columbia v. Johnson,* 165 U.S. 330, 338 (1897)) and of course there is no such statute. It follows that appellees are liable for the value of the cost of the material and labor expended upon their property.

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## CONCLUSION.

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Dated, February 5, 1951.

Respectfully,

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